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Nos. 06-82, 06-84, 06-100, 06-101

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE CO.,
Petitioner,

v.

JASON RAY REYNOLDS,
Respondent.

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 2006

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QUESTIONS PRESENTED

1. Whether petitioners have presented compelling reasons for this Court to review the meaning of the term "willful" in one subsection of the Fair Credit Reporting Act ("FCRA") in cases that are premature for review because (a) these cases are still at an interlocutory stage and were remanded for further proceedings following a reversal of summary judgment, (b) no court has ever examined the evidence of willfulness or applied any "willful" standard to the facts, and (c) there is no factual record of the "advice of counsel" defense that petitioners now raise on remand to refute a finding of willfulness?

2. Assuming that this Court should review at this interlocutory stage in the absence of a complete factual record, whether petitioners have presented compelling reasons for review in the absence of a true circuit split over the meaning of a "willful" violation for the particular subsection 15 U.S.C. § 1681n (a)(1)(A) of the FCRA that is at issue?

3. Whether GEICO, State Farm and Hartford Fire present compelling reasons to review the Ninth Circuit's interpretation of the definition of an "adverse action" and the notice requirements under the FCRA when petitioners fail to identify any conflicts among the circuits over those issues or demonstrate that the Ninth Circuit's analysis of the statutory definition is either incorrect or raises issues of national importance?

PARTIES TO THE COMBINED OPPOSITION

For the Court's convenience, respondents Jason Reynolds, Charles Burr, Shannon Massey, Ajene Edo and Julie Willes file this joint opposition to the petitions for writs of *certiorari* filed respectively by Hartford Fire Insurance Company ("Hartford Fire") (No. 06-82); Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon (collectively, "Safeco") (No. 06-84); GEICO General Insurance Company, GEICO Indemnity, and Government Employees Insurance Company (collectively, "GEICO") (No. 06-100); and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, "State Farm") (No. 06-101). Respondent Reynolds is the respondent in No. 06-82; respondents Burr and Massey are respondents in No. 06-84; respondent Edo is the respondent in No. 06-100; and respondent Willes is the respondent in No. 06-101. Because petitioners filed separate petitions that raise overlapping issues largely arising out of a single Ninth Circuit opinion, respondents file a single combined opposition.

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INTRODUCTION

The respondents in these cases are individual consumers of automobile and property/casualty insurance who suffered "adverse actions" under the FCRA when the petitioners, various insurance companies, charged them more for insurance or denied them insurance based in part on their credit information. The Ninth Circuit held that petitioners' actions were "adverse actions" within the meaning of FCRA and remanded for further consideration the arguments of certain petitioners that their actions could not be found "willful." The principal argument in these four petitions is that the Ninth Circuit erred in interpreting "willful" to include either knowing or reckless disregard for consumers' rights under the FCRA. Petitioners claim the Ninth Circuit's holding conflicts with the definition of willfulness determined by other circuits. This issue does not merit review for several reasons.

First, review of the willfulness issue by this Court would be premature. These cases arise on summary judgment and the Safeco petition involves a Fed. R. Civ. P. 54(b) interlocutory appeal. Neither the trial court nor the Ninth Circuit has yet examined the evidence to determine whether petitioners acted willfully, either knowingly or recklessly. The Ninth Circuit remanded the case so the district court could examine the evidence. Further, contrary to petitioners' contentions that they have been prevented from or prejudiced in raising the advice of counsel defense, the Ninth Circuit was not presented with an advice of counsel defense, nor did it resolve whether petitioners are entitled to such a defense. The Ninth Circuit's statements concerning the defense are *dicta*. Following remand, petitioners GEICO and Safeco have raised this defense in the trial courts. It would be premature to grant *certiorari* when there is no factual record on advice of counsel and the larger factual issue of willfulness is unresolved.

This is particularly so in a case involving an abstract concept: the meaning of "willfulness." Willfulness is a fact-bound determination not readily explained by labels such as

"reckless disregard" or "conscious disregard." This Court will provide little useful guidance to the lower courts, attorneys, or those regulated by the FCRA if it attempts to apply such labels without a concrete evidentiary record and lower court factual findings. The meaning of a knowing or reckless violation only becomes clear against a well developed record that has been reviewed by a fact-finder and includes any evidence of advice of counsel on which the petitioners may wish to rely. The Ninth Circuit simply remanded the case to the district court to review the facts and provide that record.

Second, there is no square circuit conflict. The FCRA has several different liability sections and subsections. The statutory subsection at issue here, 15 U.S.C. § 1681n (a)(1)(A), merely requires proof of a "willful" violation. The immediately following FCRA subsections expressly require proof of both a willful *and* knowing violation or solely refer to a knowing violation without reference to willfulness. 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), and 1681q. Thus, the FCRA's text makes clear that a willful violation is something less than a willful and knowing violation. The claimed circuit split is not a conflict over the interpretation of the text of the particular statutory subsection at issue here. Rather, the cases on which petitioners rely either interpret different statutory subsections, focus on the proof required to establish punitive damages, which are not at issue here, or fail to interpret the particular language of section 1681n(a)(1)(A).

Third, although petitioners assert that the Ninth Circuit's decision will expose them to a flood of litigation over the type of conduct at issue here, there is a serious question whether there is any remaining civil remedy for such violations. In the last two years, eleven different courts, including the Seventh Circuit, have concluded that the 2003 Fair and Accurate Credit Transaction Act (FACTA), which amended the FCRA, eliminated subsection 1681n claims filed after the passage of that Act for violations of section 1681m (the statute at issue here) postdating FACTA. Contrary to petitioners'

unsupported speculation that there has been an explosion in private litigation under the FCRA as a result of the Ninth Circuit's ruling, nearly every court to review the issue has concluded that FACTA prospectively eliminated the civil claims asserted here. The Ninth Circuit's ruling may thus have significance only for the finite class of pre-FACTA claims, obviating the importance of review by this Court.

Finally, petitioners State Farm, GEICO and Hartford Fire raise issues regarding the Ninth Circuit's interpretation of the definition of "adverse action" under the FCRA and its construction of FCRA's notice requirements. These petitioners do not even contend that the Ninth Circuit's routine statutory interpretations conflict with any other circuit precedent or precedent of this Court. The Ninth Circuit's interpretation of the statute is straightforward and correct.

STATEMENT OF THE CASE

I. RESPONDENTS' CLAIMS OF ADVERSE ACTION UNDER THE FCRA

This case involves interpretation of two subsections of the FCRA: 15 U.S.C. §1681n(a)(1)(A), one of the FCRA's several remedy sections, and 15 U.S.C.§ 1681a(k)(1)(B)(i), the definition of an "adverse action" under the FCRA. Respondents assert claims under subsection 1681n(a)(1)(A) for petitioners' failure to give adequate notice that they took "adverse actions" against the consumers, a violation of section 15 U.S.C. § 1681m (a). The insurance companies both denied insurance and increased premiums, "adverse actions" under the FCRA, based on review of the consumers' credit information (typically "credit scores" or "insurance scores" based on confidential financial, banking and credit information.)

The FCRA, at its core, is a notice statute. *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d, 1081, 1085 (9th Cir.

2006).[1] The FCRA gives insurance companies and other users the privilege to review confidential financial information of individual consumers. *See* 15 U.S.C. § 1681b(a)(3) (authorizing credit bureaus to provide confidential consumer credit information to insurers and others). Insurance companies use that information to price insurance premiums and decide whether to offer coverage. If an insurance company takes an adverse action, such as denying insurance or increasing a premium based on a review of a consumers' credit information (*see* 15 U.S.C. § 1681a(k)(1)(B)(i)), it must give notice that it took such action. 15 U.S.C. § 1681m.

This notice serves an important purpose by allowing consumers to check their credit files to confirm that the credit information consulted was accurate. *See Reynolds*, 435 F.3d at 1085; *see also* 15 U.S.C. § 1681 (the FCRA is designed to ensure "[a]ccuracy and fairness of credit reporting."). For instance, if an insurance company offers John *Allen* Smith a higher premium because his credit score is low, he can check whether the credit information consulted was accurate. If he discovers that the insurance company mistakenly reviewed the file of John *Alan* Smith or another consumer with a slightly different social security number, he can inform the credit bureau and, ultimately, the insurer that the insurer mistakenly increased his charge based on someone else's less favorable credit information. Or the consumer may discover that the insurer based his premium on an accurate identity, but used inaccurate financial information that lowered his credit rating and resulted in an increased charge.

In the trial court, petitioners sought summary judgment on the ground that they had not taken "adverse action"

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[1] Because *Reynolds*, the published Ninth Circuit opinion at issue, is reproduced with different pagination in each petitioner's appendix, we cite the reported opinion for simplicity *Reynolds* directly addressed the *Hartford Fire* and *GEICO* cases. The *State Farm* and *Safeco* cases were separately decided by short, unpublished memoranda citing *Reynolds*.

against respondents. Petitioners argued that when a first-time applicant for insurance is charged a higher premium because of his credit score, his premium has not been "increased"; thus, they never have to give notice of an adverse action in such circumstances and can, with impunity, use inaccurate credit information to make first-time applicants pay more for insurance. Petitioners argued that they only "increase" a premium based on credit information if they first charge a consumer a premium and later, after reviewing credit information, increase the charge (perhaps on a renewal application).

The district court initially accepted petitioners' argument, but the Ninth Circuit, relying on the statute's plain meaning, rejected it, holding that "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA." *Reynolds,* 435 F.3d at 1092. The Ninth Circuit pointed out that petitioners' position would eviscerate the statute's purpose of providing even *initial* applicants for insurance the proper notice when they are charged more based on their credit information. *Id.* at 1092-92; 15 U.S.C. § 1681a(k)(1)(B)(i) (providing that an adverse action includes "any increase in any charge for * * * any insurance, existing or *applied for*") (emphasis added). The Ninth Circuit's straightforward statutory construction ensures, as the statute provides, that consumers (including first-time applicants) who are charged more for insurance based on their credit file receive proper notice.

II. THE NINTH CIRCUIT'S STATEMENTS WITH RESPECT TO WILLFULNESS

Except for State Farm, petitioners also argued in the alternative that, as a matter of law, they did not "willfully" violate the statute under 15 U.S.C. § 1681n(a)(1)(A). Because the district court mistakenly agreed with petitioners' primary argument, it never reached the issue of defendants willfulness under subsection 1681n(a)(1)(A) or examined any evidence of willfulness. *See e.g., Rausch v. Hartford Fin. Svcs Group,*

Inc., 2003 WL 22722061, *2, n. 1 (D. Or. Jul. 31, 2003) (the "Court does not reach the additional arguments in support of Defendants' Motion for Summary Judgment"), *rev'd on other grounds,* 435 F.3d 1081 (9th Cir. 2006).

The Ninth Circuit also did not consider the evidence of willfulness. Rather, it remanded for creation of a more complete record. *Reynolds*, 435 F.3d at 1099 ("[B]ecause the parties did not have an adequate opportunity to explore the issues in the district court, we remand for further proceedings.") Preliminarily, however, the court interpreted the statute to mean that petitioners could be found willful if a fact-finder eventually found *either* that petitioners knowingly or recklessly ignored the notice requirements of the FCRA.

III. PETITIONERS' MISSTATEMENTS AND SIGNIFICANT OMISSIONS

Petitioners' statements of the case contain significant omissions and misstatements that create the mistaken impression that the Ninth Circuit decided more than it did and that the records in these actions are more completely developed than they are. Certain developments post-dating the petitions also bear on the appropriateness of review.

Petitioners suggest either that they have been precluded from raising an advice of counsel defense or that the Ninth Circuit rejected this defense or ruled on it in ways that conflict with holdings of other circuits. However, in none of these cases is there a developed record on advice of counsel, and the Ninth Circuit did not rule on the defense. The Ninth Circuit merely made observations about the possible relevance of advice of counsel to willfulness and remanded for further proceedings. *Reynolds*, 435 F.3d at 1099. Those statements are *dicta* and not the source of any circuit conflict.

Indeed, for the last several years, petitioners made a tactical choice *not* to present a full-blown advice-of-counsel defense because they did not want to share the actual advice they received (which was almost certainly different from the

legal arguments they made to the district court and Ninth Circuit) and waive the attorney-client privilege as a result. Only on remand some petitioners recently raised the advice of counsel defense. The result may ultimately be a developed factual record and legal rulings based on it, but until then this case will not present any issues regarding advice of counsel suitable for appellate review, let alone review in this Court.

Petitioners also create the mistaken impression that these are certified class actions for punitive damages. Petitioners are wrong on both counts. Class certification issues are still before the trial court. In addition, respondents have stated on the record several times that they are not pursuing claims for punitive damages and have withdrawn those claims below or dropped them from amended complaints. Respondents repeat here that they are not seeking punitive damages. Respondents only seek the statutory damages (between $100 and $1,000) that Congress has provided for willful violations of the FCRA under subsection 1681n(a)(1)(A).

This Court also should be aware of certain developments that petitioners do not mention because they postdate the filing of the petitions. Most significantly, since the petitions were filed, petitioner Hartford Fire and respondent Reynolds have entered into a Memorandum of Understanding that settles the putative class case. While Hartford Fire has yet to withdraw its petition, it has agreed to do so once there is a class settlement finally approved by the district court.[2]

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[2] Other insurers have similarly settled the FCRA claims or chosen not to seek review of the Ninth Circuit's opinion. Nationwide Insurance Company settled an identical and related case before the Ninth Circuit even ruled on its case, for $280 per class member in statutory damages. In another appeal from a related case that the Ninth Circuit decided with these cases, Farmers Group Inc. chose not to seek *certiorari* from the Ninth Circuit's identical decision in their case. *See Ashby v. Farmers Group, Inc.*, No. 04-80084, Mem. Op. (9th Cir. Aug. 4, 2005).

REASONS FOR DENYING THE WRIT

I. THE PETITIONS ARE PREMATURE BECAUSE THEY ARISE OUT OF SUMMARY JUDGMENT, ARE BASED ON AN INCOMPLETE RECORD, AND THE FACTS ON WILLFULNESS HAVE NOT BEEN REVIEWED BY A LOWER COURT.

A. No Court Has Examined the Summary Judgment Facts on Willfulness.

It would be premature to address the meaning of willfulness in the current procedural context. These petitions arise out of summary judgment proceedings and, in the case of the *Safeco* appeal, a Fed. R. Civ. P. 54(b) judgment, and the disposition below was a remand for further proceedings in all cases. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 506 U.S. 946 (1993) (Scalia, J., respecting the denial of *certiorari*). The Court ordinarily limits its review of cases in an interlocutory posture to extraordinary circumstances, such as when it is necessary to prevent great inconvenience in the conduct of further proceedings. Robert L. Stern, et al., Supreme Court Practice § 4.18, at 258 (8th ed. 2002) (citing cases). The mere announcement of an abstract standard for willfulness to be applied at some point in the future does not cause great inconvenience or present extraordinary circumstances.

While Safeco, joined by all petitioners, contends that it presents a question of "enormous practical significance," it is difficult to believe that regulated persons are waiting for abstract guidance, without the benefit of how that guidance applies to any specific conduct, on whether they can be liable for either consciously or recklessly ignoring the FCRA. One would hope that corporations that enjoy the privilege of using consumer's personal banking information, credit information, social security information and other private data are not recklessly misusing such protected information in the hope

that recklessness will not suffice to make them liable under the statute. These are certainly not the "extraordinary circumstances" that should lead this Court to give guidance prior to a final resolution and in the absence of a well-developed record reviewed by the district court below.

Here, not only did this issue arise on summary judgment, but the lower courts have never even applied the law to any factual record. The district court decided these cases on alternative grounds and never considered the facts on willfulness. *See e.g., Rausch*, 2003 WL 22722061 at *2. The Ninth Circuit also did not decide the willfulness issue, but simply announced a general standard for willfulness to be applied on remand. *Reynolds*, 435 F.3d at 1099.

The meaning of the term "willful," as petitioners themselves point out, is abstract. This Court would provide little guidance to the lower courts if it simply announced an abstract definition without any corresponding application of that standard to a fully developed factual record. While the Ninth Circuit did its best to guide the district court by announcing a standard that could be applied to the facts on remand, the case will be in a better procedural posture, if still not a good candidate for Supreme Court review, once the factual record is developed and the district court has the opportunity to apply the standard to the facts — including the as-yet completely undeveloped record on what petitioners view as the critical issue of advice of counsel.

Indeed, there are many possibilities for these cases on remand. The district court may ultimately conclude that plaintiffs presented sufficient evidence that defendants "knowingly" violated the FCRA, providing evidence that goes beyond a reckless violation.[3] Thus, petitioners' request

[3] The Safeco petitioners boldly predict that had this case been heard in other circuits, the decision granting summary judgment would be affirmed. Safeco Pet. 16. Because the courts below never examined the evidence on willfulness under any standard, this is pure, and likely inac-

(*Footnote continued*)

for a higher standard of knowing and willful conduct may ultimately be irrelevant if the court or a jury later concludes that defendants acted *both* knowingly and recklessly.

In addition, these cases may resolve by settlement. As noted above, petitioner Hartford Fire has already entered into an initial settlement with a putative class and will withdraw its petition once it is finally approved by the district court.

B. There is No Factual Record of an Advice of Counsel Defense.

Petitioners make many misstatements about the status of the advice of counsel defense. For instance, petitioner Safeco states that "the Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of lawyers and clients that is unprecedented in the decisions of this Court." Safeco Pet. 22.

No petitioner, however, properly raised the "advice of counsel" defense in its summary judgment motions, and neither the district court nor the Ninth Circuit ruled on such a defense. There is no factual record of any advice of counsel defense.[4] Indeed, having prevailed on other arguments in the trial court, petitioners did not want to raise the defense and waive their attorney-client privilege unless and until they had no other supportable defense. Far from "refusing to recog-

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curate, speculation. While the district court did not reach the issue in these cases, the same court held in the related *Nationwide* case that plaintiffs would survive summary judgment even under a "knowing" standard. *Razilov v. Nationwide Mut. Ins. Co.*, 2004 WL 3090083 (D. Or. 2004).

[4] In its summary judgment papers in the trial court, GEICO did say it had consulted counsel, but it presented no evidence of what counsel advised, the timing of the consultation in relation to the conduct, or whether GEICO followed the advice. A defendant is not entitled to an advice of counsel defense "merely because he consulted an attorney in connection with a particular transaction"; he must also show that he disclosed the material facts to counsel and received advice on which he actually relied in good faith. *United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006).

nize" an advice of counsel defense, the Ninth Circuit remanded the case so that petitioners could raise the defense on remand. *Reynolds*, 435 F.3d at 1099. In fact, petitioners Safeco and GEICO have now raised the defense on remand.

C. Recent Developments Since the Filing of the Petitions Confirm That the Facts of This Case Should Be Fully Developed and Not Subject to Piecemeal Review by This Court.

Developments that have taken place since the Ninth Circuit ruled further confirm that it would be premature to review these cases because of the uncertainties that exist prior to a full trial, complete factual record, and final dispositions of these cases. Not only has Hartford Fire entered into a settlement that, once approved, will moot its case before this Court could decide it, but the Safeco petitioners have now, for the first time, raised issues about whether two of the Safeco companies are proper parties to the case. These developments illustrate that the very identities of the parties are still in flux and highlight the substantial risks attendant to granting a writ of *certiorari* at an interlocutory stage of any case. This Court should not reach out to rule until it is clear that its decision will bind the appropriate parties. Without a settled record and final judgment, the landscape on remand below is constantly changing. Indeed, the parties are continuing to litigate class, discovery and other issues to this day.

II. THERE IS NO CONFLICT ON THE MEANING OF WILLFULNESS.

Petitioners maintain that this case merits review because, they claim, there is a circuit conflict regarding the meaning of a willful violation under the FCRA. Despite the Ninth Circuit's reference to a split of authority, a careful review of the statute and case law reveals there is no well-developed circuit conflict with respect to the definition of a willful violation for the particular statutory subsection at issue here, 15 U.S.C. § 1681n(a)(1)(A). The cases that petitioners cite either (a) refer

to the *mens rea* requirements for violations of sections 1681n(a)(1)(B) or 1681n(b), which both expressly require proof of a "knowing" violation, (b) involve the issue of punitive damages under section 15 U.S.C. §1681n(a)(2), or (c) otherwise do not analyze the particular statutory language at issue here. Moreover, the great majority of the cases petitioners cite do not expressly address the issue of "reckless disregard" at all, belying petitioners' claims of a mature conflict among the circuits over that specific issue.

A. The Ninth Circuit's Statutory Interpretation Is Firmly Grounded in the Statutory Language

Before turning to the claimed circuit conflict, respondents briefly review the statutory language. The claimed conflict largely disappears when it is understood that the FCRA has several different remedial subsections under the FCRA.[5]

Respondents' claims arise under 15 U.S.C. § 1681n (a)(1)(A), which provides that any person who "willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of — (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000, whichever is greater." In contrast to other FCRA sections, this subsection does not require proof of a knowing violation.

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[5] Except for State Farm, petitioners conveniently refer either to the entire section 616n of the original bill or to the codified section 1681n without addressing the several subsections with different remedial provisions and different language under 1681n. Petitioners' failure to engage in statutory analysis at the textual level of each subsection is revealing. State Farm incongruously argues that the term "willful" when used alone must mean "willful and knowing" even when Congress clearly distinguished between those distinct terms by requiring proof of only a "willful" violation for a claim under subsection 1681n(a)(1)(A), but requiring proof of both a "willful and knowing" violation in the immediately following remedial subsections of the FCRA. *See* State Farm Pet. 26-28.

The very next subsection, 1681n(a)(1)(B), provides for actual damages or at least $1,000 in statutory damages as well as punitive damages for a violation that is not only "willful" but also involves "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*" (emphasis added). Similarly, section 1681n(b) imposes liability on "any person who obtains a consumer report from a consumer reporting agency under false pretenses or *knowingly without a permissible purpose*" (emphasis added). In addition, Congress provided criminal liability under section 1681q for "any person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). The references to willful *and* knowing violations would be superfluous if the definition of willful already required knowingly wrongful conduct.

Congress plainly understood that a merely willful violation requires something less than proof of a willful *and* knowing violation because it expressly required proof of a knowing violation or of both a "willful and knowing" violation in other civil and criminal subsections. When Congress wanted to require proof of a knowing violation of FCRA, it knew how to do so. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating that Congress "says in a statute what it means and means in a statute what it says there.") With respect to section 1681n(a)(1)(A), it did not. *See United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (noting the logic of investing significance in a notable omission of words in determining Congressional intent). Thus, the Ninth Circuit's conclusion that a willful violation does not require proof of a knowing violation is fully consistent with standard statutory interpretation.

Petitioners contend that the legislative history demonstrates that the Ninth Circuit's definition of willfulness is incorrect. But because the statutory text is clear, there is no need to consult legislative history. *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002).

Even if this Court were interested in legislative history, petitioners fail to cite the most directly relevant indication in that history of Congress's understanding of the meaning of "willful" conduct. In an early version of 15 U.S.C. 1681q, Congress provided criminal liability for "whoever willfully violates any provision" of the FCRA. H.R. 19410, 91st Cong., Sec. 62 (1970). Congress eventually added a "knowing and willful" criminal *mens rea*, indicating that Congress understood "willful" to mean something less than "knowing and willful" for purposes of this statute. The statute's evolution thus confirms the Ninth Circuit's interpretation of the text.

Given the language and history of the statute, the Ninth Circuit's conclusion that "willfulness" under subsection 1681n(a)(1)(A) incorporates both knowing and reckless disregard of a defendant's legal obligations is fully consistent with this Court's construction of "willfulness" in statutes dating back to the 1930s. *See Reynolds*, 435 F.3d at 1098; *see, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (a willful violation of the Age Discrimination in Employment Act requires only a "reckless disregard for the matter of whether its conduct was prohibited"); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (stating same knowing or reckless standard); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938) (holding that civil defendant's conduct was "willful" because it showed disregard for statute and indifference to its requirements). The standard statutory definition for willful (where willful is not more specifically defined in the statute) has been settled in this Court for decades and does not need revisiting.[6]

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[6] State Farm mistakenly relies on *Kawahaauhau v. Geiger*, 523 U.S. 57, 60 (1998), in which this Court was interpreting the meaning of the bankruptcy statutes that excepts "willful and malicious injury" from bankruptcy discharge. The statute here does not require the additional element of a "malicious" injury

B. There Is No Circuit Conflict with Respect to 15 U.S.C. § 1681n(a)(1)(A).

1. The other circuits do not address the particular language of Section 1681n(a)(1)(A).

Turning to the claimed circuit conflict, a close look at the cited opinions reveals there is no direct conflict with respect to the interpretation of the text of the particular statutory subsection, 15 U.S.C. § 1681n(a)(1)(A), at issue here. In *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002), the only case cited by petitioners that explicitly criticizes the use of a "reckless disregard" standard under any subsection of the FCRA, the Eighth Circuit noted that the plaintiff had not clearly alleged which statutory subsection the defendant violated, but ultimately concluded that the plaintiff was alleging a violation of section 1681n(a)(1)(B), which, as noted above, expressly requires proof of obtaining a consumer report not only "willfully," but also "under false pretenses or knowingly without a permissible purpose."

Similarly, in *Duncan v. Handmaker*, 149 F.3d 424, 426 (6th Cir. 1998), the plaintiff "sought to hold defendants civilly liable for procuring the [plaintiffs'] consumer reports under false pretenses." The Sixth Circuit noted that plaintiffs invoked a prior version of the statute that provided civil liability for violation of the criminal section, 1681q, "which criminalizes the act of knowingly and willfully obtaining information under false pretenses." 149 F.3d at 426, n 1. Several other circuits also specifically analyze 15 U.S.C. § 1681q, which "imposes criminal liability upon any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." *Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987). *See also Bakker v. McKinnon*, 152 F.3d 1007, 1010 (8th Cir. 1998) (analyzing a claim for a violation of section 1681(q)); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (analyzing knowing or false pretense

standard under section 1681q).[7] These circuits' requirement of proof of a knowing violation under a different statutory subsection, 1681q, are consistent with the Ninth Circuit's interpretation of subsection 1681n(a)(1)(A).

The remaining cases relied upon by petitioners fail to interpret the particular text of subsection 1681n(a)(1)(A) or broadly refer to Section 1681n without any substantive textual analysis. *See Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 417-418 (4th Cir. 2001) (citing generally section 1681n and 1681o and failing to address the specific statutory language); *Ausherman v. Bank of America Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (following *Dalton* without textual analysis); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004) (citing generally section 1681n and stating only that proof of punitive damages requires proof of a knowing and intentional violation); *Ruffin-Thompkins v. Experian Info. Solutions*, 422 F.3d 603, 610 (7th Cir. 2005) (citing *Wantz* and section 1681n generally); *Bagby v. Experian Info. Solutions*, 162 Fed. Appx. 600, 605 (7th Cir. 2006) (same); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (generally referring to "[s]ection 1681n [which] authorizes the court to award actual damages, punitive damages and reasonable attorney fees * * *.") Moreover, in none of these cases did the courts specifically address the question of "reckless disregard" as an avenue of proving willfulness, let alone reject it.

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[7] Petitioners also claim that the Ninth Circuit's opinions conflict with an unpublished Ninth Circuit opinion, *Arriola v. Safeco*, 1993 WL 530480 (9th Cir. 1993). Intra-circuit conflicts are generally not a ground for certiorari, and because *Arriola* is non-precedential, there is no intra-circuit conflict in any event. Moreover, petitioners made this same argument to no avail when requesting that the Ninth Circuit rehear these cases *en banc*. *Arriola* involved the criminal liability section 1681q which requires proof of both a willful and knowing violation. *Arriola*, 1993 WL 530480, *1. Likely recognizing the absence of any conflict, the Ninth Circuit denied *en banc* rehearing in all cases.

Further, a number of the circuits that discuss a willful violation of section 1681n, even if vaguely and without analysis of the statutory language of the particular subsections, do so in the context of resolving a claim for punitive damages under section 1681n(a)(2). The Fourth and Fifth Circuits (and a number of later cases) expressly rely on an earlier Fifth Circuit case, *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987). *See Dalton*, 257 F.3d at 418 (quoting *Pinner*); *Stevenson*, 987 F.2d at 293-94 (quoting and relying on *Pinner*); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) (quoting *Pinner* in case involving jury award of $4.47 million for willful violation). *See also Northrop v. Simsbury, Inc.*, 12 Fed. Appx. 44, 50 (2d Cir. 2001) (failing to analyze statutory text and reviewing claim for punitive damages based on willful violation); *Casella v. Equifax Credit Info. Svc's*, 56 F.3d 469, 476 (2d Cir. 1995) (same), *cert. denied*, 517 U.S. 1150 (1996); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) (analyzing punitive damages); *Wantz*, 386 F.2d at 833 (same). In *Pinner*, the definition of willfulness adopted by the court was based on the requirements for proof of punitive damages under section 1681n(a)(2). The court focused on whether the jury had sufficient evidence to award punitive damages:

> 'Willful' is a word of many meanings — its construction often influenced by its context. But here, there is simply nothing to even suggest that [defendants] willfully set out to do Pinner harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. The jury's award of punitive damages lacked any evidentiary support whatsoever.

805 F.2d at 1263. Unlike *Pinner* and its progeny, the cases at issue do not involve any claim for punitive damages as respondents, plaintiffs below, seek only statutory damages.

We have no quarrel with *Pinner*. The meaning of willful is often influenced by context. As State Farm argues, this Court has examined statutory terms such as willful "both in the immediate context in which it is used and the context of provisions in which it is embedded." *See* State Farm Pet. 24 (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)). Indeed, in *Bryan*, this Court noted that a willful *mens rea* may include "careless disregard" for the rights of others. 524 U.S. at 191, n. 12. Here, Section 1681n(a)(1)(A)'s use of the term "willful," without reference to knowledge, means something less than a knowing violation in the context of the "other provisions in which it is embedded," which include Congress's express requirement of proof of a "knowing and willful" violation under sections 1681q and 1681n(a)(1)(B).

2. The Ninth Circuit's definition of willful is consistent with other circuits' definitions.

The Ninth Circuit's definition of a willful violation under section 1681n(a)(1)(A) expressly relies upon and is entirely consistent with the Third Circuit's definition. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997).[8] In *Cushman*, the Third Circuit noted that plaintiff could prove her FCRA violation if she proved either that the defendant credit reporting agency took action "knowing that policy to be in contravention of the rights possessed by consumers or in reckless disregard of whether the policy contravened those rights." *Id.* at 227. This is the same standard expressly adopted by the Ninth Circuit. *Reynolds*, 435 F.3d at 1097. Petitioner Safeco incredibly tries to create a circuit conflict out of whole cloth by claiming that even the Third Circuit's interpretation in "*Cushman* cannot plausibly be said to hold that 'reckless disregard' satisfies the 'willfulness' standard under § 616." Safeco Pet. 17, n 7. On the contrary, the Third

[8] *Cushman* itself involves punitive damages and does not directly address the specific issue in this case, liability under § 1681n(a)(1)(A).

Circuit's express holding that proof of "reckless disregard" satisfies the statute cannot be read any other way. Significantly, in light of petitioners' assertion of a raging conflict over this issue, *Cushman* has not been rejected, criticized, or even distinguished by any other court of appeals in a case under section 1681n (a)(1)(A) in the nearly ten years since the case was decided; indeed, the decision below and *Phillips*, which addressed a claim under section 1681n(a)(1)(B), appear to be the only appellate decisions ever to have discussed *Cushman's* recklessness holding.

Moreover, the Third Circuit's interchangeable use of the terms "conscious disregard" and "reckless disregard" indicates that the Circuits do not find these terms significantly different. *Cushman*, 115 F.3d at 226-227 (citing *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996), and *Pinner*, 805 F.2d at 1263). Similarly, the Ninth Circuit expressly held that the willfulness standard involves "'a conscious disregard' of the law, which means either 'knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.2d at 1098, *quoting Cushman*, 115 F.3d at 227. Except for *Phillips*, which involved subsection 1681n(a)(1)(B), petitioners cite no court that has expressly disagreed with the Ninth and Third Circuits and held that "conscious disregard" and "reckless disregard" are mutually exclusive under this statute, and thus opinions that merely mention "conscious disregard" cannot be interpreted as conflicting with the decision below (or with *Cushman*).

C. The State Farm Petitioners Did Not Raise the "Willfulness" Issue Below and Cannot for the First Time Before This Court.

State Farm acknowledges that the willfulness issue was not decided below in its case, but still contends that it may raise that issue solely because the Ninth Circuit based its unpublished *State Farm* opinion on its resolution of *other* issues

in its published *Reynolds* opinion. State Farm Pet. 29 n.15. State Farm contends that *every* issue raised in *Reynolds*, including willfulness, is therefore a proper issue for review in *State Farm*. That is not the law. State Farm argued to the Ninth Circuit only that (1) State Farm Fire did not take an "adverse action" against respondent Willes and (2) State Farm Mutual did not reject Willes's application because, according to State Farm, she only applied to State Farm Fire. *See* State Farm Appellees' Br. 2 (Issues Presented for Review). State Farm did not argue willfulness in its brief, and its petition does not even claim it did,[9] nor did the Ninth Circuit mention willfulness in its *State Farm* memorandum. Having neither been raised nor decided below, the issue is not properly before this Court in the State Farm petition. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

D. The Ninth Circuit Did Not Resolve Any Advice of Counsel Defenses.

Having failed to create a credible circuit split on the definition of "willful" for the purposes of Section 1681n(a)(1)(B), petitioners try to redefine the Ninth Circuit's standard as a mere negligence standard through their discussion of a red-herring issue — the *potential* "advice of counsel" defense for which there is no factual record.

Because the Ninth Circuit did not rule on the advice of counsel defense, its observations about the subject are *dicta* and could not form the basis for any claim of a circuit split. Even as *dicta*, the Ninth Circuit's observations are not "extreme," as petitioners suggest. The Ninth Circuit merely stated that "neither a deliberate failure to determine the ex-

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[9] State Farm belatedly raised the issue when seeking *en banc* rehearing, which the court denied in *State Farm* without reaching this issue.

tent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement." *Reynolds*, 435 F.3d at 1099. The Ninth Circuit's view is entirely consistent with the settled principle that an advice of counsel defense cannot prevail if the defendant did not honestly believe the advice received was proper but instead had "reason to doubt" it. *United States v. Mathes*, 151 F.3d 251, 255 (5th Cir. 1998), *cert denied*, 525 U.S. 1059 (1998) (citation omitted). A blatant inconsistency between the purported advice and the clear terms of a statute would clearly be a relevant consideration in assessing such a defense. Petitioners pull out of context individual words such as "unreasonable" to create the impression that the Ninth Circuit adopted a negligence standard, when the Ninth Circuit was only guiding the district court to look at the extent of "the obviousness or unreasonableness of the erroneous interpretation." *Reynolds*, 435 F.3d at 1099. Indeed, the Ninth Circuit expressly rejected a negligence standard. 435 F.3d at 1097-98 (citing *McLauglin*, 486 U.S. at 133 (noting that willful conduct is not merely negligent)).

Rather than credibly arguing that this *dicta* somehow creates a conflict in the law, petitioners favor sweeping statements of hyperbole that the Ninth Circuit has somehow prejudged the evidence. To that end, State Farm argues:

> Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how business and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and the legal system.

State Farm Pet. 29. The purportedly skewed "factors" (actually standard and neutral tests for proving willful misconduct) do not prejudge the conduct of petitioners or their at-

torneys because the Ninth Circuit did not reach the evidence, much less find that petitioners acted willfully "as a matter of law." The court reached no conclusion as to how petitioners' lawyers "view[ed] their obligations to their clients and the legal system," precisely because petitioners have not yet offered any evidence of their lawyers' advice. Indeed, for all we know, their lawyers may have given proper direction on how to follow the law, which petitioners disregarded.

The Ninth Circuit's *dicta* concerning advice of counsel is also not in conflict with *Thurston*, 469 U.S. at 128. In *Thurston*, this Court concluded that the defendants had not willfully violated the ADEA because defendants had offered evidence that they had consulted with their attorneys in *good faith* to determine if a retirement policy in a massive collective bargaining was proper. *Thurston* expressly held that "the record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." 469 U.S. at 129. Here, by contrast, there is no record of any petitioner's consultations with attorneys (whether in good faith or not), and the Ninth Circuit stated, consistently with *Thurston*, that "[a] company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous interpretation of the statute." 435 F.3d at 1099.

Petitioners also contend, without record support, that the after-the-fact legal *arguments* they made to the district court and the Ninth Circuit reflected the same legal *advice* on how to comply with the FCRA that they received from counsel at the time of the conduct giving rise to the violations, and they leap from that unfounded factual premise to the conclusion that their reliance on counsel could not have been reckless or even unreasonable simply because the district court later erroneously accepted their interpretation of "adverse action" under FCRA (an interpretation held by the Ninth Circuit to

be contrary to the plain meaning of the Act). As support for this argument, and to suggest a conflict with decisions of this Court, petitioners cite *Professional Real Estate Investors v. Columbia Pictures Ass'n*, 508 U.S. 49 (1993) ("*PREI*"), which they say holds that a legal position accepted by a district court cannot, as a matter of law, be unreasonable.

PREI, however, has no bearing on this case. *PREI* concerns the "sham" exception to antitrust immunity and holds only that judicial findings that a litigant has objectively reasonable grounds for litigating preclude a finding that the litigation was a sham. More generally, the *PREI* Court observed, in a footnote cited by petitioners, that a "winning lawsuit" cannot be objectively unreasonable. *Id.* at 57 n.5. But litigation in which a party's arguments are rejected on appeal can hardly be termed "winning." Nowhere does *PREI* or any other case cited by petitioners hold that an after-the-fact argument raised in litigation in defense to a statutory violation provides an absolute advice of counsel defense as long as a district court initially (but erroneously) agrees with the argument. Indeed, legal advice received after the conduct cannot support a defense of lack of willfulness. *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1259 (Fed Cir. 1997), *cert denied*, 523 U.S. 1071 (1998).

Petitioners also cannot cite a single case holding that a defendant cannot be liable *as a matter of law* for a willful violation on an issue of first impression, particularly where, as here, the statute is unambiguous on its face, and there is evidence that petitioners were instructed on how to comply with the statute by specific FTC advisories, understood they had to comply, and had notice from prior case law that discussed the issue without definitively deciding it.[10]

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[10] *See e.g.*, FTC "Prescribed Notice of User Responsibilities," 16 C.F.R. Pt. 601, App. C (stating in July 1997 that "adverse actions include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact * * *"); March 1, 2000 letter

(*Footnote continued*)

In *Reich v. Gateway Press*, 13 F.3d 685, 701 (3d Cir. 1994), relied upon by petitioners, the Third Circuit affirmed the district court's conclusion that there was evidence that the defendant reasonably believed it was complying with the law and, therefore, was not willful. While the court noted that this was an issue of first impression and considered that a factor in determining willfulness, it did not hold that a defendant can never willfully violate a statute unless that statute has been previously interpreted. Such a sweeping conclusion would give all regulated persons the right to violate any statute with impunity until it has first been interpreted by a court. There is no case so holding and no conflict in either this Court's or the court of appeal's case law on this point.[11]

Finally, the evidence below, though not fully developed, indicated that petitioners' legal arguments in this litigation were directly contrary to their understanding at the time of their conduct. For instance, petitioner Hartford Fire argued to

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from FTC's Hannah Stires to James Ball (providing notice to insurance companies in March 2000 that failing to offer best price or discount in response to initial application for insurance was adverse action); FTC Notice, "Consumer Reports: What Insurers Need to Know" (stating in October 1998 that adverse action occurs when initial applicant denied coverage at standard rates). *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 (S.D. Ohio 1999) (stating in the context of a class action decision that offering an initial applicant less favorable credit terms based on credit information may be adverse action under FCRA).

[11] *Stevenson v. TRW, Inc.*, 987 F.2d at 296, notes that the defendant did not have prior guidance that its notice of consumer rights was deficient, but it does not hold that the statute had to be interpreted by a court first. In *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995), the court exercised its discretion to deny punitive damages where prior maritime law decisions provided no specific guidance to the defendant. In *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985), the court held that a defendants' reliance on certain appellate rulings was reasonable in light of a circuit-split that had not been resolved. None of these fact-bound decisions holds that a defendant cannot, as a matter of law, willfully violate a statute that has not been interpreted.

the district court and the Ninth Circuit that "an insurer does not take 'adverse action,' ... when the insurer charges a specific insured an initial premium on a new policy that is higher than the best rate available." Hartford Resp. Br. 9. However, *at the time of the conduct at issue*, Hartford Fire instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers not receiving our best rate."[12] The record on review does not support petitioners' unsupported assumption that the after-the-fact legal arguments that they made below necessarily reflected their subjective understanding at the time they violated the FCRA.

III. THIS CASE LIKELY WILL NOT HAVE WIDESPREAD IMPACT IN LIGHT OF DECISIONS HOLDING THAT A RECENT FCRA AMENDMENT HAS PROSPECTIVELY ELIMINATED THE CLAIMS ASSERTED HERE.

Contrary to petitioners' predictions, there is substantial doubt that these cases will have major ongoing impact in light of recent decisions holding there is no longer a private civil right of action under section 1681n for violations of section 1681m, the "adverse action" notice requirement. Petitioners fail to inform this Court that at least eleven courts, including the Seventh Circuit and several district courts within the Ninth Circuit, have held that a 2003 amendment to the FCRA, the Fair and Accurate Credit Transactions Act (FACTA), eliminated private rights of action for violations of 15 U.S.C. § 1681m that postdate FACTA. *See* 15 U.S.C. 1681m(h)(8)(A) (stating that section 1681n shall not apply to violations of this section and providing exclusive enforcement by federal agencies); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 950 (7th Cir. 2006); *Putkowski v. Irwin Home*

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[12] Attached to Appellants' Response to Appellees' Second Amended Petition for Rehearing *En Banc*, *Reynolds v. Hartford Fire*, Ninth Circuit Case No. 03-35695.

Equity Corp., 423 F.Supp. 2d 1053, 1061-62 (N.D. Cal. 2006); *Phillips v. New Century Fin. Corp.*, 2006 WL 517653, *3-4 (C.D. Cal. Mar. 1, 2006); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183, 1187 (N.D. Cal. 2006); *Harris v. Fletcher Chrysler Prods.*, 2006 WL 279030, *3 (S.D. Ind. Feb. 2, 2006); *Stavroff v. Gurley Leep Dodge*, 413 F. Supp. 2d 962, 967 (N.D. Ind. 2006); *Murray v. Household Bank (SB),* 386 F. Supp. 2d 993, 999 (N.D. Ill. 2005); *Bonner v. Home123 Corp.*, 2006 WL 1518974, *5 (N.D. Ind. May 25, 2006) ("*Bonner I*"); *Bonner v. CorTrust Bank*, 2006 WL 1980183, *3 (N.D. Ind. July 12, 2006) ("*Bonner II*"); *Crowder v. PMI Mortgage Ins. Co.*, 2006 WL 1528608, *2-5 (M.D. Ala. May 26, 2006); *Cavin v. Home Loan Ctr,* 2006 WL 1313191 (N.D. Ill. May 10, 2006); *but see Barnette v. Brook Road*, 429 F. Supp. 2d 741, 748 (E.D. Va. 2006) (rejected in *Bonner I*, *Crowder*, *Bonner II*, and *Cavin*).

As the Seventh Circuit explained in *Murray*:

> A recent amendment to the Act abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation. See 117 Stat.1952, adding 15 U.S.C. § 1681m (h)(8).

434 F.3d at 950. Respondents take no position about the correctness of these decisions, but they at least cast serious doubt on petitioners' assertion that the Ninth Circuit's decision will unleash a flood of new litigation under the FCRA.

While petitioners fail to mention these cases, they provide vague, misleading and incomplete citations to recently filed cases that are intended to give this Court the mistaken impression that there has been an explosion of litigation under section 1681n(a)(1)(A) as a result of the Ninth Circuit's ruling. Petitioners' purported support for such groundless claims is merely a reference to dockets of cases in which plaintiffs purportedly included a claim under section 1681n of the FCRA without identifying which subsection is at issue.

Safeco Pet. 13, n.5; Hartford Pet. 23. These references fail to demonstrate any connection between the Ninth Circuit's opinion and the recently filed cases. Undoubtedly, there have been many cases filed under the FCRA in federal courts for over thirty years because the statute regulates many different entities, including, most comprehensively, the credit bureaus that provide credit information. Petitioners' attempt to attribute an increase in litigation to the Ninth Circuit's opinion is pure speculation. As noted above, it is more likely that there has been or will be a decline in the filing of these types of cases because the courts have held that the claims at issue here have been eliminated by the FACTA.

IV. PETITIONERS' REMAINING CHALLENGES TO THE NINTH CIRCUIT'S RULING ON "ADVERSE ACTION" UNDER THE FCRA DO NOT MERIT REVIEW.

State Farm and GEICO also seek review of the Ninth Circuit's interpretation of "adverse action" under the FCRA. Neither State Farm nor GEICO contends that the Ninth Circuit's statutory interpretation conflicts with the law of this Court or any other circuit. As the Ninth Circuit correctly noted, no other circuit has addressed the definition of "adverse action" under section 1681a(k)(1)(B)(i). *Reynolds*, 435 F.3d at 1091. Moreover, the Ninth Circuit's interpretation is consistent with the Sixth Circuit's interpretation of a similar notice provision in the Truth in Lending Act ("TILA"). *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding TILA's notice requirements are triggered when a credit customer is charged more than he otherwise would have been if he had paid in cash). State Farm and GEICO do not provide any "compelling reasons" for review. Their arguments are solely directed at correction of a supposed error and without merit in any event.

A. State Farm Misinterprets the Statute.

The FCRA provides that an insurance company must give notice if it takes an adverse action against any consumer "based in whole or part on any information contained in a consumer report." 15 U.S.C. § 1681m (a). The definition of "adverse action" includes "an increase in any charge, or a reduction or other unfavorable change in the terms of * * * any insurance, *existing or applied for* in connection with the underwriting of insurance" 15 U.S.C. § 1681a(k)(1)(B) (emphasis added). Thus, the definition includes an increase in either a renewal or an *initial* applicant's charge for insurance. Eviscerating FCRA's purpose of providing notice when consumers are charged more based on the review of their private credit information, the district court held that an increase could only occur if an applicant initially applied for insurance, received a premium quote, and then that initial quote was later increased based on the applicant's credit information. State Farm continues to assert this position on review.

As the FTC made clear in an amicus brief before the Ninth Circuit on this narrow issue, "[t]his is absurd since it assumes that an insurer would make a formal offer of insurance to a consumer and then, after making that offer, would evaluate the consumer's insurability." FTC Amicus Br. 14 (filed in Ninth Circuit in *Willes v. State Farm*, Case No. 03-35848). The Ninth Circuit agreed and correctly held that an increase occurs when the consumer is charged more for insurance "based in whole or part" on credit information — in other words, the consumer is entitled to notice if she would have received a lower rate if she had a better qualifying credit score or other relevant credit information. *Reynolds*, 435 F.3d at 1093.[13] This holding is not radical. Indeed, this is

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[13] State Farm misleadingly states that the Ninth Circuit requires notice to everyone who does not have "perfect credit." State Farm Pet. 18. That is not the standard. The insurance companies themselves set the credit scores at which consumers will be charged more for insurance, and

(*Footnote continued*)

the understanding that petitioner Hartford Fire, and likely all petitioners, had when it instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers *not receiving our best rate*." *See* footnote 12, *supra*. It is also the position that the FTC staff, well before this lawsuit, had taken for years based on a plain reading of the statute. *See* footnote 10, *supra*. A contrary rule would permit insurance companies to increase rates charged millions of consumers for insurance, perhaps based on inaccurate information, without giving consumers any notice or opportunity to confirm that their rates were being increased based on accurate information. *Reynolds*, 435 F.3d at 1092.[14]

B. The GEICO Petitioners Misstate the Ninth Circuit's Holding.

In an attempt to make the Ninth Circuit's straightforward statutory interpretation appear extreme, the GEICO petitioners simply misrepresent it. The GEICO petitioners argue that the Ninth Circuit's ruling requires that insurance companies give notice to consumers "even though their credit informa-

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do not require a perfect score for the best-rate. Thus, if an insurance company charges anyone who has a credit score under 700 (on a scale of 850) more for their insurance, only those consumers are entitled to notice.

[14] State Farm also contends that the Ninth Circuit erred in holding one of its companies, State Farm Mutual, could be liable under FCRA, because, it asserts, respondent Willes only applied to State Farm Fire. In *Reynolds*, the Ninth Circuit, relying on the plain language of FCRA making "any person" who takes an adverse action liable for a failure to give notice, 15 U.S.C. § 1681m (a), held that when an insured seeks insurance from a family of companies, and when each of them might have offered insurance depending on the applicant's credit score, each company may be liable for violating FCRA's notice requirements if an adverse action (premium increase or denial of insurance) is not disclosed. 435 F.3d at 1095-97. The court applied this ruling in *State Farm*, holding that because State Farm Mutual denied Ms. Willes a policy because her credit score was not higher, it could be liable under FCRA. State Farm does not contend that this common-sense, fact-bound ruling is in conflict with any other appellate decisions. The issue plainly does not merit review.

tion had either no impact or a favorable impact on the rates or terms provided." GEICO Pet. 25. The Ninth Circuit actually held just the opposite: that notice is only required if a "consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. That is, the consumer is only entitled to notice when his premium is increased above what it would have otherwise been "based in whole or in part" on a review of his credit information." 15 U.S.C. § 1681m(a). In any event, GEICO's incorrect contention that Edo somehow benefited from GEICO's review of his credit information, which resulted in a higher charge, is truly a quarrel with the Ninth Circuit' application of law to fact, and not an issue meriting review here.

C. The Ninth Circuit's Opinion Does Not Impose New Notice Requirements Under the FCRA.

Finally, Hartford Fire, in an argument presented as an afterthought, contends that the Ninth Circuit imposed new notice requirements on insurers. It did not. The Ninth Circuit's ruling on the adequacy of Hartford's notices was based simply on the fact that "[t]hey did not tell [the insured] that any adverse action had been taken against him" and thus did not comply with a bedrock requirement on the face of the statute. *Reynolds*, 435 F.3d at 1095. The Ninth Circuit's further descriptions of the statutory notice requirements are *dicta* that merely restate and explain in plain English the notice requirements set forth in section 1681m(a) of the FCRA. Hartford Fire does not contend, and cannot, that there is any circuit conflict on this issue, any conflict with the precedents of this Court, or any other proper reasons why this is an issue worthy of this Court's review. In any event, because the Hartford petitioners are settling, there is no need to resolve the issue in this case.

CONCLUSION

For the reasons stated above, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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